No. 15056

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD H. CLINTON,

Appellant,

vs.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, INC., a corporation, *et al.*,

Appellees.

APPELLEE'S BRIEF.

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Jurisdictional Statement.

This is an appeal from a final judgment of the United States District Court for the Southern District of California, Honorable William Mathes, Judge, presiding, in an admiralty suit *in personam* by the libelant as a citizen of the State of California, for wages, maintenance, breach of contract, inducement of breach of contract, and trespass to general property rights.

The libel was cast in nine separate causes of action. The first three causes of action were stated as against this appellee, International Organization of Masters, Mates & Pilots, Inc., a New York corporation, alleging various violations of appellant's rights as a member of appellee as said rights are set forth in the constitution and by-laws of appellee.

The fourth, fifth, sixth, seventh and eighth causes of action are directed against Joshua Hendy Corporation, a California corporation, and Pacific Far East Lines, Inc., a California corporation, and allege various breaches of contract, personal injuries caused by negligence and unseaworthiness, rights to maintenance and cure, loss of wages, and wrongful inducement of breach of contract.

The ninth cause of action was directed against the State of California Employment Stabilization Commission for alleged wrongful withholding of unemployment benefits.

The libel alleges jurisdiction under 28 U. S. Code 1332, by reason of diversity of citizenship, and under 28 U. S. Code 1333 as a civil case of admiralty and maritime jurisdiction. No jurisdiction exists by reason of diversity of citizenship for the reason that complete diversity of citizenship does not exist as between the libelant, a citizen of the State of California, and all of the respondents, some of whom are also citizens of the State of California. No jurisdiction exists under 28 U. S. Code 1331, as no case is stated which arises under the Constitution, laws, or treaties of the United States.

Statement of the Case.

The appellant's libel was prepared *in pro. per.* It has proven difficult for us to analyze and comprehend the allegations of the libel. We trust that the following description of the basic allegations are reasonably accurate and fair to the appellant.

The first cause of action appears to be based on the theory that the libelant was a probationary member of appellee and was registered for work in the San Francisco office of appellee, managed by a Mr. Jackson. On March 10, 1953, Mr. Jackson dispatched the appellant on a two-

day relief mate job which libelant, as a probationary member of appellee, was not entitled to perform. While libelant was on the relief job a regular member, as distinguished from a probationary member, was dispatched on a foreign voyage. Appellant apparently claims that Mr. Jackson's action was negligent and resulted in libelant sustaining damages due to losing eighty-seven days of work and wages in the sum of $2,262.00.

The second cause of action states that libelant became a full book or regular member of appellee in December of 1953, and thereafter was registered for work at appellee's Wilmington, California, office, managed by one Captain Durkin, and that appellant was entitled to perform relief work. It is by no means clear what happened thereafter, but we gather that libelant was disciplined by appellee's trial committee for breach of regulations in that he failed to report for work as required. Appellant claims that the discipline was wrongfully imposed, whereby he sustained damages in the sum of $1,032.00.

The third cause of action states that appellant was restored to good standing in July of 1954, and that in September of 1954 charges were brought against him by reason of his alleged misconduct while employed on the S.S. "Marine Arrow," owned or operated by Joshua Hendy Corporation. He was apparently found guilty of the charges and was expelled from appellee's organization. Appellant claims that his expulsion was irregular and that he has sustained damages of $200.00 per month, and in an unknown amount, as a result.

The trial court dismissed the libel on its own motion for the reasons that no cause was stated within the admiralty and maritime jurisdiction, that no complete diversity of citizenship existed so as to sustain jurisdiction under

28 U. S. Code 1332, and that the libel did not comply with General Admiralty Rule 22 in that the libel did not propound and allege in distinct articles the various allegations of fact upon which the libelant relies in support of his suit so that the respondent or claimant may be enabled to answer distinctly and separately the several matters contained in each article.

The first cause of action of the libel had previously been made the subject matter of Case No. 27105, between the same parties, in the United States District Court for the Northern District of California. This libel was dismissed by Judge Murphy for want of jurisdiction. The order therein was filed on August 1, 1955. The appellant herein has confirmed the identity of the first cause of action in this libel with the libel in the Northern District Case No. 27105 on page 7 of his original brief or memorandum.

The second and third causes of action of the instant libel were alleged in Case No. 17955 in the Southern District of California between the same parties. These causes of action were dismissed by Judge Westover by order sustaining exceptions for want of jurisdiction entered on July 5, 1955. The identity of the second and third causes of action of this libel with the causes of action directed against appellee in Southern District Case No. 17955 is confirmed by appellant herein at page 14 of his brief. Appellant also confirms the prior disposition of all three causes of action in paragraph 1, page 1, of his document entitled "Reply to Counter Designations of Appellee, etc."

Appellant filed exceptions to the first, second and third causes of action herein on the ground of *res adjudicata,*

no appeal having been taken from the final orders of dismissal in the above designated cases. The exceptions so filed were not heard for the reason that the court dismissed all three causes of action on its own motion.

This appeal is concerned primarily with the question of existence of admiralty and maritime jurisdiction. The appellant does not specify as error the action of the trial court in dismissing the libel for failure to comply with General Admiralty Rule 22, and it would appear that this question has been finally resolved against the appellant. Presumably if the question of jurisdiction is resolved in appellant's favor by this Court the appellant may undertake to amend his libel so as to comply with General Admiralty Rule 22. As a secondary issue authorities will be cited to support the proposition that all three causes of action are barred by the principle of *res adjudicata.*

Summary of Argument.

Disputes between a maritime union and one of its members arising out of the internal administration of the union are not within admiralty and maritime jurisdiction. If such disputes are concerned with the member's status within the union and are alleged to involve breach of contract such contract is not a maritime contract. It is at most preliminary to a potential employment contract between the member and a ship operator. If such disputes involve alleged torts there is no admiralty jurisdiction unless the alleged torts occurred on navigable waters.

All three causes of action against this appellee have been finally adjudicated and each is *res adjudicata.*

ARGUMENT.

I.

Disputes Between a Maritime Union and One of Its Members Arising Out of the Administration of Internal Affairs Are Not Within the Admiralty and Maritime Jurisdiction.

It is difficult to determine whether the appellant is proceeding on a theory of breach of maritime contract or upon a theory of commission of a maritime tort. The first cause of action alleges wanton and willful misinterpretation of the union constitution and by-laws and is suggestive of an alleged tort by one of the officers or agents of appellee. Other language suggests breach of contract by the appellee. The second and third causes of action deal primarily with matters of discipline imposed upon appellant and allege wrongful conduct by a union officer or agent. The theory seems to be breach of contract, but a theory of tort cannot be ruled out.

(a) There Is No Admiralty Jurisdiction Based Upon Maritime Tort.

If the libel is based on negligence no tort within the admiralty jurisdiction is alleged as there is no allegation of any tort which occurred upon navigable waters.

Benedict on Admiralty (6th Ed.), Sec. 2, p. 2, and Sec. 127, p. 349;

Forgione v. United States (C. C. A. 2), 202 F. 2d 249, 1953 A. M. C. 323.

(b) There Is No Admiralty Jurisdiction Based Upon Maritime Contract.

Admiralty does not have jurisdiction based on contract unless the entire contract is maritime in nature. It is not sufficient to support admiralty jurisdiction that some

maritime ingredients are involved. It is not sufficient to support admiralty jurisdiction that the contract is of a preliminary nature which may lead to the execution of a maritime contract. As examples of authorities establishing these interrelated propositions we refer to:

The Ada, 250 Fed. 194. Herein the libel was upon a contract described as a charter. The charter contained a contract of sale, and one of the elements of damages claimed was for the breach of the sales contract. The District Court found that the owner had wrongfully withdrawn the chartered vessel and was liable for the losses thereby sustained by the charterer and that the damages for breach of contract were not recoverable in admiralty. On appeal the decree was reversed in its entirety on the ground that the contract was not wholly maritime. We refer to the following statement.

> "Evidently the whole controversy could have been disposed of in an action at law, but the jurisdiction of a court of admiralty is confined to maritime subjects. It cannot, having obtained jurisdiction, dispose of nonmaritime subject, for the purpose of doing complete justice, after the manner of courts of equity, nor can it distribute funds in its possession, as do courts of equity and bankruptcy, among all creditors, preferred and general. Its power to dispose of the proceeds of a vessel, though it extends to the payment of nonmaritime liens, after maritime liens have been satisfied, does not extend to claims in personam or of general creditors, except so far as to pay over any surplus to the owner."

The opinion in *The Ada, supra,* cites *Turner v. Beachem,* Fed. Cas. 14,252, from which the following is quoted:

> "And I consider it to be a clear rule of admiralty jurisdiction that, although the contract which the

> party seeks to enforce is maritime, yet, if he has connected it inseparably with another contract over which the court has no jurisdiction, and they are so blended together that the court cannot decide one, with justice to both parties, without disposing of the other, the party must resort to a court of law, or a court of equity, as the case may require, and the admiralty court cannot take jurisdiction of the controversy. The case of Grant v. Poillon was decided upon this ground at the last term of the Supreme Court. 20 How. 162, 15 L. Ed. 871."

The Pennsylvania, 154 Fed. 9, is also cited in *The Ada, supra.* The Pennsylvania was demised to a charterer who contracted to take young men on a nine months' sea voyage during which time they would receive a course of study. The charterer received large advances on account of the contracts but failed to prepare the vessel for the trip or to perform the contract in any respect. The vessel was libeled by the parents of the young men who were to make the trip. The libel was dismissed on the ground, as stated by the Court of Appeals, that there was no jurisdiction whatever in admiralty because the contract was one for education as well as for transportation.

The Eli Whitney, Fed. Cas. 292-A, D. C. Mass. 1947. Admiralty does not have jurisdiction over a contraversy involving the breach of stipulations, conditions, and representations leading to the execution of a charter party but not contained within it.

Kaufman v. John Block Co., 60 Fed. Supp. 992. Admiralty does not have jurisdiction over a cause of action based upon misconduct of corporation officers in wrongfully issuing bills of lading for carriage by sea.

The Harvey and Henry, 86 Fed. 656. Admiralty does not have jurisdiction over a contract for soliciting cargo and freight, as such is only preliminary to the possible execution of subsequent maritime contracts. "The distinction between preliminary services leading to a maritime contract and such contracts themselves has been affirmed in this country from the first." *The Thames,* 10 Fed. 848. An insurance broker's contract to procure insurance upon a vessel for a contemplated voyage is not maritime. *Marquardt v. French,* 53 Fed. 606. Neither is a freight agent's contract to solicit freight, nor a ship broker's contract to secure a charterer for a ship. *The Crystal Stream,* 25 Fed. 575; *Torices v. The Winged Racer,* 39 Hunt, Mer. Mag. 458, Fed. Cas. No. 14,102; Benedict on Admiralty, Sec. 212. "Undertakings which are merely personal in their character, or which are preliminary or leading to maritime contracts do not seem ever to have been recognized as within the admiralty jurisdiction." *Cox v. Murray* (Betts, J.), Abb. Adm. 342, Fed. Cas. No. 3-304. In *Plummer v. Webb,* 4 Mason 388, Fed. Cas. No. 11,233, Judge Story says: "In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime." See also *Diefenthal v. Steamship Co.,* 46 Fed. 397, and cases there cited."

Goumas v. Karras, S. D. N. Y. 51 Fed. Supp. 145, affd. 140 F. 2d 157.

In this case the Second Circuit Court of Appeals affirmed a decision of the trial court dismissing a libel on exceptions for want of jurisdiction. The libelant was a ship chandler and provided a crew for the respondent's vessel. The crew found the ship uninhabitable and re-

fused to serve. The libelant incurred expenses in connection with the crew's charges for transportation, maintenance, and other related matters. The trial court relied in part upon *Cory Bros. v. United States,* 51 F. 2d 1010, cert. den. 278 U. S. 632, and quoted from Judge Swan's opinion as follows:

> "If the contract merely employed libelant to procure maritime services instead of obligating it to perform them itself, it may well be that a suit to recover compensation and disbursements would be not of maritime cognizance. Such a distinction has been frequently observed. Thus, while a contract for the charter of a ship is clearly maritime in nature, a contract creating an agency to obtain charterings has been held nonmaritime. (Citing cases.) * * * The same has been held as to a contract with an agent to procure crews. The *Retriever,* 93 Fed. 480 (D. C. W. D. Wash); insurance on a ship, *Marquardt v. French,* 53 Fed. 603 (D. C. S. D. N. Y.); freight and passengers (citing cases), * * *. The rationale has been thus stated: 'That distinction between preliminary services leading to a maritime contract and such contracts themselves has been affirmed in this country from the first, and not yet departed from. It furnishes a distinction capable of somewhat easy application. If it be broken down, I do not perceive any other dividing line for excluding from the admiralty many other sorts of claims which have a reference, more or less near or remote, to navigation and commerce. If the broker of a charter-party be admitted, the insurance broker must follow—the drayman, the expressman, and all others who perform services having reference to a voyage either in contemplation or executed.' Brown, J., in the *Thames* (D. C.), 10 Fed. 848. See, also, the *Harvey and*

Henry, 86 Fed. 656 (2 C. C. A.); 1 Benedict, Admiralty (5th Ed.), sec. 62. Apparently the same ground explains the decision in *Minturn v. Maynard,* 58 U. S. 477, 15 L. Ed. 235, where the libellant had been employed by the shipowner as general agent and had expended money for supplies, repairs, and advertising of the ship. The suit was for disbursments and commissions, and it was held that the agent's remedy was not a libel in admiralty but a suit in assumpsit. (Citing cases.) * * *." (1931 A. M. C. 1445.)

Giving the appellant every benefit of doubt, his libel against this appellee falls within the principles stated in the above citations. His status as a union member has only a remote and preliminary bearing upon any maritime services or contracts to which he might become a party. It may be that by maintaining his union status the appellant would be employed by maritime employers pursuant to contracts negotiated by the appellee. The terms and conditions of appellant's membership in the appellee would have no bearing upon the terms and conditions of his subsequent employment in a seafaring capacity. It might equally well be that if appellant were employed as a mate on a vessel he would require his own sextant and pocket chronometer. If he had purchased these items under a conditional sales contract certainly that contract would not be within the admiralty and maritime jurisdiction because of the end results which might be accomplished by their use, and the same principle applies to the terms and conditions of his membership in appellee. The supplying of fishermen bound on a fishing voyage with necessary articles for the voyage is not a maritime transaction.

The *Mary F. Chisholm,* 129 Fed. 814.

A large number of similar contracts which have a seagoing background but which are nonmaritime for the purpose of conferring admiralty jurisdiction are collected and described in *Benedict on Admiralty* (6th Ed.), Sec. 67, p. 138, *et seq.*

There are many organizations and associations which are primarily interested in maritime matters, of which the Propeller Club of the United States, the Maritime Law Association of the United States, and the various associations of sport authorities, are examples. The relationships between such associations and their members, while maritime in flavor, would not give rise to causes of Admiralty jurisdiction because of the salty background of the personalities involved. If the admiralty should extend its jurisdiction to a case such as this it would open the door to a flood of causes which have nothing to do with maritime matters directly but which only remotely affect navigation and commerce. If admiralty should extend its jurisdiction to problems between a seaman and his union it would logically be expected to exercise jurisdiction over the seaman's problems with his pawnbroker or with the seaman's attempts to recover wages lost to a B-girl in a waterfront bistro.

Judge Murphy's order in *Clinton v. Masters, Mates & Pilots, etc.,* Northern District of California Case No. 27105 is an able judicial evaluation of the first cause of action included in the instant case. It is equally applicable to the second and third causes of action. That order is as follows:

> "Libelant, a seaman, brings this suit under the provisions of 28 U. S. C., sec. 1916. This libel is difficult of interpretation, but the gravamen thereof seems to be that libelant was a member of respondent union,

that an officer or agent of said respondent union 'wanton and wilfully through his negligent interpretation of the union constitution, rules and by-laws, dispatched libelant to a temporary job, promising him a preferred position with respect to other jobs that might become available after the completion of the temporary assignment, but that said agent failed to do so.' Libelant's statement of facts lends itself to a theory of negligence by a union officer, or breach of contract by the union.

"On neither of these theories is there any action within the admiralty jurisdiction of this Court. This is a dispute between a member of the union and the union, or a union officer, all residents of California, with respect to certain rights of the union member under the terms of membership, and, conceivably, a separate agreement made between the member and the union. This is not a maritime case. The mere fact that the libelant is a seaman does not convert his disputes into maritime contracts or maritime torts such as to confer admiralty jurisdiction upon this Court. Accord, *Warner v. The Bear,* 126 F. Supp. 529 (D. C. Alaska 1955); *D. C. Andrews & Co. v. United States,* 124 F. Supp. 362 (Ct. Clms. 1954); *Grank Banks Fishing Co., Inc. v. Styron,* 114 F. Supp. 1 (S. D. Maine 1953); *Goumas v. Karras,* 51 F. Supp. 145 (S. D. N. Y. 1943).

"Respondent's motion to dismiss is therefore granted. Dated: July 13th, 1955."

II.

The Subject Matter of This Appeal Is Res Adjudicata.

Each of the three causes of action stated against this appellee have been previously dismissed on the hearing of exceptions for want of jurisdiction, as more specifically appears from appellee's Statement of the Case. No appeal was taken from the orders of dismissal, and the orders have become final.

Ordinarily, *res adjudicata* does not apply in the absence of a prior hearing on the same subject matter between the same parties on the merits. All that is determined upon such a disposition is that as between the parties the cause of action pleaded is not within the jurisdiction of the court. The libelant is free to start again and allege additional facts which are sufficient to establish jurisdiction. The appellant herein has not chosen to follow this course. He has elected to file a series of libels in several of the District Courts of this Circuit, realleging in each instance the same facts previously alleged in libels dismissed for want of jurisdiction.

In this situation, where the same facts and the same issues have been once presented between the same parties and the libel dismissed for want of jurisdiction the principle of *res adjudicata* does apply.

Hicks v. Holland (C. C. A. 6), 235 F. 2d 183;
Hedger, etc. v. Bushey, etc. (C. C. A. 2), 186 F. 2d 236.

We respectfully submit that the judgment of dismissal in the court below should be affirmed.

Respectfully submitted,

Allan F. Bullard,

Proctor for Appellee.